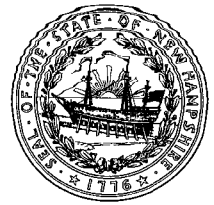




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Joseph Frawley
2 Paul Avenue
Derry, NH 03038

Re: 2 Paul Avenue, Derry, NH
Wetlands Bureau File #2005-955

ADMINISTRATIVE ORDER
No. WD 06-040

August 23, 2006

A. INTRODUCTION

This Administrative Order is issued by the Department of Environmental Services, Water Division to Joseph Frawley pursuant to RSA 482-A:6. This Administrative Order is effective upon issuance.

B. PARTIES

1. The Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Joseph Frawley is an individual having a mailing address of 2 Paul Avenue, Derry, NH 03038.

C. STATEMENTS OF FACTS AND LAW

1. Pursuant to RSA 482-A, DES regulates dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. RSA 482-A:3, I, states that "[no] person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
3. RSA 482-A:14, III, provides that "[f]ailure, neglect or refusal to comply with [RSA 482-A] or rules adopted under [that] chapter, or an order or condition of a permit issued under [RSA 482-A], and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by [RSA 482-A] shall be deemed violations of RSA 482-A."

4. RSA 482-A:11, IV, specifies that any permit for work in or adjacent to prime wetlands shall not be issued unless the department is able, specifically, to find clear and convincing evidence on the basis of all information considered by the department, and after public hearing, that the proposed activity, either alone or in conjunction with other human activity, will not result in the significant net loss of any of the values set forth in RSA 482-A:1.
5. Joseph Frawley is the owner of property located at 2 Paul Avenue in Derry more particularly described on the Town of Derry Tax Map 8 as Lot 151 ("the Property").
6. Review of DES records indicate that the Property contains wetlands that are designated as prime pursuant to RSA 482-A:15 by the Town of Derry and are identified as Derry Prime Wetland A/9.
7. Per Wt 303.02(f) projects located in or adjacent to prime wetlands designated under RSA 482-A:15 are classified as major impacts.
8. On May 11, 2005, DES personnel conducted an inspection of the Property in response to a complaint from the Town of Derry. The area of alleged impact was behind the house; the backyard. During the inspection, DES personnel found the following:
 - a. Approximately 7,745 sq ft of wetlands had been filled adjacent to a Town of Derry designated Prime Wetland (based on GPS points gathered at the property).
 - b. Approximately 1,655 sq ft of wetlands had been dredged/filled within a Town of Derry designated Prime Wetland (also based on GPS points gathered at the property).
9. DES has no record that a permit was issued under RSA 482-A for the work observed on the Property.
10. On May 27, 2005, Letter of Deficiency No. WET 2005-13 (the "LOD") was issued to Mr. Frawley requesting that by June 15, 2005, he retain a certified wetland scientist ("CWS") to develop a restoration plan to restore the impacted areas. The restoration plan was due for submission to DES by July 15, 2005.
11. On June 16, 2005, a representative of Meridian Land Services, Inc. contacted DES indicating that Meridian Land Services, Inc. had been retained by Mr. Frawley to develop a wetlands restoration plan.
12. On July 28, 2005, DES received a Proposed Wetland Restoration Plan from Meridian Land Services, Inc., in response to the LOD. The wetlands were delineated by Christopher A. Guida, CWS #53. A plan was submitted by Meridian Land Services, Inc., stating that a total of 4,469 sq ft of wetlands were impacted. DES personnel digitized the plan and calculated approximately 1,564 sq ft of the impact was located within the Prime Wetland.
13. According to the restoration plan, Mr. Frawley impacted wetlands within 20 ft of the property line as well as on the abutting property.

14. On August 16, 2005, DES sent a Restoration Plan Approval letter to Mr. Frawley granting permission to conduct the work specified in the restoration plan. A deadline date of October 15, 2005 was set for the submission of the initial monitoring report following restoration.

15. On September 27, 2005, DES personnel conducted a site inspection to view the progress of the restoration. At that time, no restoration had taken place. The fill was still in the wetlands and the silt fence, for erosion control, was installed improperly. The bottom of the silt fence was 3-4 inches off the ground and was not embedded into the earth.

16. On October 17, 2005, DES sent a letter to Mr. Frawley indicating that DES had not received the monitoring report that was due October 15, 2005 and that he was still obligated to restore the wetland.

17. On October 24, 2005, DES received information from New Hampshire Natural Heritage Bureau stating that the impacted wetland is habitat to the Dwarf Huckleberry (*Gaylussacia dumosa*) which has a state legal status of "Threatened" and a state conservation status of "Imperiled due to rarity or vulnerability." The wetland itself is considered a "Poor level fen/bog system" which has a state conservation status of "Rare or uncommon."

18. On March 29, 2006, DES sent Mr. Frawley a letter requesting the site be restored by May 19, 2006 and a monitoring report be submitted by May 31, 2006.

19. On June 9, 2006, DES personnel conducted a site inspection to determine the status of the restoration. No monitoring report had been submitted at that point. During the inspection, DES found that the backyard, including portions of the wetland, had been leveled. The tops of the fill piles had been removed however the bases remained in the wetland. None of the specified vegetation had been planted and the restoration had not been completed. Loam had been recently applied to the entire backyard including portions of the wetland.

20. During the June 9, 2006 inspection, another violation was observed that had occurred on the eastern side of the property at some point following the September 27, 2005 DES inspection. The new violation consisted of filling a minimum of 180 sq ft of previously delineated and mapped wetland with riprap. This work occurred after DES personnel met with Mr. Frawley on site and explained the permitting requirements to him, after DES issued him a Letter of Deficiency, and after he had the wetlands delineated and mapped.

D. DETERMINATION OF VIOLATIONS

1. Mr. Frawley has violated RSA 482-A:3, I by dredging/filling approximately 4,469 sq ft of a jurisdictional wetland in and adjacent to designated prime wetlands on the Property and the abutting property without a permit from DES.

2. Mr. Frawley has violated RSA 482-A:3, I by willfully and knowingly filling a minimum of 180 sq ft of additional jurisdictional wetland without a permit from DES following issuance of a Letter of Deficiency and following delineation and mapping of the subject wetland.

3. Mr. Frawley has violated RSA 482-A:3 by failing to properly install and maintain temporary siltation and erosion controls to protect immediately adjacent wetlands and surface waters.

E. ORDER

Based on the above findings, DES hereby orders Mr. Frawley as follows:

1. **Immediately cease and desist** all work in wetlands and surface waters except as specifically Ordered in E.2 through E.5, below.

2. **Within 15 days from the date of this Order**, submit an amended restoration plan to DES for review and approval. Have the restoration plan prepared and stamped by a certified wetland scientist. The plan should include provisions for removal of the fill material from the wetland/prime wetland as specified in the original restoration plan and restoration of the newly impacted wetland area below the culvert outlet. The plan shall include the following:

- a. Existing conditions and land topography with dimensions drawn to scale including wetland boundaries delineated in accordance with the 1987 Army Corps of Engineers Wetland Delineation Manual and the boundary of the prime wetland;
- b. The location of the property boundary in relation to the unpermitted impacts.
- c. Proposed conditions after re-establishing the jurisdictional area;
- d. A detailed description of the proposed means of erosion control (silt fence, hay bales, etc) and stabilization of the restoration area;
- e. A detailed description of the proposed planting plan for the stabilization and re-vegetation of the restoration area and of the method of control of invasive species such as purple loosestrife (*Lythrum salicaria*) and common reed (*Phragmites australis*);
- f. A description of the proposed restoration sequence detailing the methods for accomplishing restoration and including an anticipated restoration compliance date;
- g. A description of the method of documenting at least 85% survival of all vegetation planted during the restoration project. This should include, at a minimum, monitoring progress reports for two successive growing seasons following completion of the restoration project. The monitoring reports should be submitted to DES no later than September 1, 2007 and September 1, 2008.

3. Acquire permission from the abutting lot owner, Map 8 Lot 150, to conduct the required restoration work on their property.

4. Retain a qualified wetland scientist to supervise the implementation of the restoration plan and to submit the restoration progress reports.

5. **Within 30 days from the date of the approval of the amended restoration plan,** implement the amended restoration plan after receiving written approval from and as conditioned by DES. Removal of fill and restoration of the site must be achieved.

6. Monitor and maintain all existing erosion controls until restoration is completed and the site is permanently stabilized. Submit photographs to DES mounted on 8.5" x 11" white paper by the last day of each month documenting compliance with this provision of the Order.

Send correspondence, data, reports, and other submissions made in connection with this Administrative Order, **other than appeals**, to DES as follows:

Eric Skoglund, Compliance Specialist
DES Water Division
P.O. Box 95
Concord, NH 03302-0095
Fax: (603) 271-6588
e-mail: eskoglund@des.state.nh.us

F. APPEAL

Any person aggrieved by this Order may request that DES reconsider this determination within 20 days of the date of the Order. The request for reconsideration must comply with Wt 203.01(d) (copy attached), and will be processed in accordance with Wt 203.01(e)-(j). Any party not satisfied with the decision on reconsideration may appeal to the Wetlands Council. Please note that under RSA 482-A:10, II, the Council may not consider any ground that is not set forth in the request for reconsideration.

Filing an appeal or request for reconsideration of the Order will not automatically relieve Mr. Frawley of his obligation to comply with the Order.

G. OTHER PROVISIONS

Please note that RSA 482-A:13 and RSA 482-A:14 provides for administrative fines, civil penalties, and criminal penalties for the violations noted in this Order, as well as for failing to comply with the Order itself. Mr. Frawley remains obligated to comply with all applicable requirements. DES will continue to monitor Mr. Frawley's compliance with applicable requirements and will take appropriate action if additional violations are discovered.

This Order is being recorded in the Rockingham County Registry of Deeds so as to run with the land.

~~COPY~~

Harry T. Stewart, P.E., Director
Water Division

~~COPY~~

Michael P. Nolin, Commissioner
Department of Environmental Services

Certified Mail/RRR: 7006 0100 0005 8153 5412

CC: Gretchen Hamel, Legal Unit Administrator
Public Information Officer, DES PIP Office
Jennifer Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Town of Derry Conservation Commission
Town of Derry Selectmen
Meridian Land Services, Inc., PO Box 118, Milford, NH 03055